Kuala Reman Estates Bhd & Anor v Faber Merlin Malaysia Bhd

HIGH COURT (KUALA LUMPUR) - SUIT NO D4-22-860-1989
ZAKARIA YATIM J
29 JUNE 1989

Civil Procedure - Injunction - Tenancy dispute - Landlord seeking interlocutory mandatory injunction against tenants so as to prevent tenant from entering or remaining on premises - Tenant seeking interlocutory injunction so as to prevent landlord from taking possession of premises - Landlord and tenant having claims against each other - Serious question to be tried - Specific Relief Act 1950, ss 20 & 54

There were two applications before the court. The first was filed by the plaintiffs and by which they sought an injunction restraining the defendant from taking possession, control and or management of a hotel. The second application was filed by the defendants and by which they asked the court to order that the plaintiffs forthwith vacate the defendant's land and premises, namely, the hotel and to grant an injunction restraining the plaintiffs from entering or remaining in the hotel and/or from obstructing or interfering in the management and use of the hotel by the defendant.

The second plaintiff, Hotel Merlin Kuala Lumpur Sdn Bhd was the operator of the hotel. The second plaintiff was a wholly-owned subsidiary of the defendant up to 1 March 1988 when by an agreement in writing made on that date the first plaintiff bought the entire capital of the second plaintiff from the defendant. At the same time, two other agreements were executed. One was an agreement by which the defendant granted a tenancy to the second plaintiff and the other an agreement between the second plaintiff and the defendant by which, inter alia, the defendant were to acquire all the assets of the second plaintiff in exchange for the assumption by the defendant of the second plaintiff's liabilities and obligations. The defendant was also to release and discharge the second plaintiff of all inter-company loans made by the defendant to the hotel. Later, the defendant claims various sums from the second plaintiff in respect of arrears of rent and municipal taxes, assessments and rates. The second plaintiff refused to pay the sums and commenced an action against the defendant. The defendant filed a defence and counterclaim and the plaintiffs filed a reply and defence to the counterclaim on 1 June 1989. On 15 June 1989, the defendant forcibly took possession of the hotel.

There were disputes between the parties as to the amount of the liability of the plaintiffs to the defendant following the acquisition of the second plaintiff's share capital by the first plaintiff and the acquisition of the assets of and the takeover of the liabilities of the second plaintiff by the defendant. In addition, the second plaintiff had made a claim against the defendant for utility charges for goods supplied and services rendered. The second plaintiffs also alleged that the defendant had in breach of its obligations in the agreements failed to undertake certain improvements to the hotel and to make certain payments and as a result the plaintiffs had to incur the expenditure themselves. The second plaintiff refused to make further payments of rent, claiming a set-off against all moneys owing by the defendant and against all moneys paid and to be paid on behalf of the defendant.

Held, granting the plaintiffs' application and dismissing the defendant's application:

(1) There were several serious questions to be tried in regard to the plaintiffs' claim. The plaintiffs' claim was closely connected with the defendant's claim for arrears of rent under the tenancy agreement. Whether or not the plaintiffs were entitled to a set-off, there was a serious question to be tried. Whether or not the defendant can rely solely on the tenancy agreement and take advantage of it even though the three agreements were inter-related to one another is a serious question to be tried. Whether the agreements were specifically enforceable or not was also a serious question to be tried.

(2) The second plaintiff would suffer irreparable damage which could not be compensated if the injunction prayed for by the plaintiffs was not granted. The loss of the goodwill and reputation of the second plaintiff if the injunction was not granted cannot be compensated by money. It was not in dispute that the second plaintiff had the expertise to operate a first class five-star hotel. On the other hand there was no evidence that the defendant had the expertise to operate a first class hotel like the second plaintiff did. It was clear therefore that the balance of convenience lay in favour of granting the injunction sought by the plaintiffs.

(3) The defendant had sought a mandatory injunction but had to show that this was an exceptional and extremely rare case for the court to grant a mandatory injunction. Furthermore the balance of convenience was not in favour of granting the injunction. It was true that the defendant was entitled to take possession of the hotel under the tenancy agreement but the court had to consider the defendant's obligations under the other two agreements as well as there were allegations that the defendant had acted in breach of these two agreements.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02-244 of 1989.]

Cases referred to

1 *British Anzani (Felixstowe) Ltd* v *International Marine Management (UK) Ltd* [1979] 2 All ER 1063 (refd)
2 *Permodalan Plantations Sdn Bhd* v *Rachuta Sdn Bhd* [1985] 1 MLJ 157 (refd)
3 *Si Rusa Beach Resort Sdn Bhd* v *Asia Pacific Hotels Management Pte Ltd* [1985] 1 MLJ 132 (refd)
4 *American Cyanamid* v *Ethicon* [1975] AC 396 (refd)
5 *Sivaperuman* v *Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 (refd)
6 *Nouvau Mont Dor (M) Sdn Bhd* v *Faber Development Sdn Bhd* [1984] 2 MLJ 268 (distd)
7 *Bank Islam Malaysia Bhd* v *Tinta Press Sdn Bhd and Ors* [1986] 1 MLJ 256 (refd)
8 *Tinta Press Sdn Bhd* v *Bank Islam Malaysia Bhd* [1987] 2 MLJ 192 (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Specific Relief Act 1950 ss 20(1), 54

Dennis Xavier for the plaintiffs.
Mohamed Ismail bin Mohd Shariff for the defendant.

Cur Adv Vult

Zakaria Yatim J: On 20 June 1989 there were two applications for hearing before this court. The first application was filed by the plaintiffs. In that application the plaintiffs sought the order of the court to grant an injunction restraining the defendant whether by itself, its agents or servants from taking possession, control and/or manage-

ment of the Kuala Lumpur Merlin Hotel and costs. The second application was filed by the defendant. In that application the defendant asked the court to order that the first and second plaintiffs forthwith vacate the defendant's land and premises, namely, the Kuala Lumpur Merlin Hotel and to grant an injunction restraining the first and second plaintiffs from entering or remaining on the said hotel, and/or from obstructing or interfering the management and using of the said hotel by the defendant, its servants or agents. The defendant's application was for a mandatory injunction. After hearing the arguments of both counsel for the plaintiffs and for the defendant, I made an order in terms of the plaintiffs' application subject to the usual undertaking as to damages. The defendant's application was dismissed with costs. I stated that I would give my reasons later. I do so now.

The first plaintiff (hereinafter referred to as 'Reman Estates') is a public limited company incorporated under the laws of Malaysia having its registered office at Suite 9.03, 9th Floor, Wisma KLI, 126, Jalan Bukit Bintang, Kuala Lumpur. It is the present shareholder of Hotel Merlin Kuala Lumpur Sdn Bhd, (hereinafter referred to as 'Hotel Merlin'), the second plaintiff. The second plaintiff is the present operator of the hotel. The defendant is a public limited company incorporated under the laws of Malaysia having its registered office at the 5th Floor, Wisma Merlin, Jalan Sultan Ismail, Kuala Lumpur (hereinafter referred to as 'Faber Merlin'). Before 1 March 1988 Faber Merlin was a holding company of Hotel Merlin which was a wholly-owned subsidiary of Faber Merlin.

On 1 March 1988 a sale and purchase agreement was entered into between Faber Merlin and Reman Estates. Under this agreement, Reman Estates agreed to purchase from Faber Merlin all the 750,000 shares in Hotel Merlin for a consideration of $2. Faber Merlin was the registered and beneficial owner of all the said shares. The agreement provided that the effective time and date of the transfer of ownership of Hotel Merlin would be at12.01 am on 1 March 1988. Under the agreement Faber Merlin undertook to pay and settle the Employees Provident Fund of all employees of Hotel Merlin for the months prior to 1 March 1988. Under cl 4(b) of the agreement, Reman Estates agreed and undertook to cause Hotel Merlin to execute simultaneously with this agreement (i) a tenancy agreement whereby Faber Merlin would let and Hotel Merlin would take the hotel building and equipment more fully described in the tenancy agreement and (ii) the agreement for the sale of assets and assumption of liabilities.

The agreement for the sale of assets and assumption of liabilities was entered into between Hotel Merlin and Faber Merlin on 1 March 1988. According to the preamble of the agreement Faber Merlin wished to acquire all the assets of Hotel Merlin in exchange for the assumption by Faber Merlin of all of Hotel Merlin's liabilities and obligations. Faber Merlin would also release and discharge Hotel Merlin of all inter-company loans lent to the hotel by Faber Merlin. Under cl 1 of the agreement, Hotel Merlin agreed to sell, convey, transfer and deliver to Faber Merlin all the assets and properties of Hotel Merlin as enumerated and specified in sch 1. Schedule 1, however, was left blank when the agreement was signed. Clause 2 provided that in consideration for the sale, conveyance, transfer and delivery as stipulated in cl 1, Faber Merlin assumed and agreed to pay, perform and discharge all obligations and liabilities of Hotel Merlin as enumerated and specified in sch 2, provided that Faber Merlin would have no liability with respect to any debts or liabilities of any kind, character or discipline, whether accrued, absolute, stringent or otherwise as to which no provision or reference was made in sch 2. Schedule 2 merely contained the names of five creditors and the amount outstanding as at 29 February 1988 was left blank. Under cl 2, Faber Merlin also agreed to release and forever to discharge Hotel Merlin of inter-company loans enumerated and specified in sch 3. Schedule 3 was also left blank.

The tenancy agreement was entered into between Faber Merlin and Hotel Merlin on 1 March 1988. Under this agreement the hotel and its equipment were leased by Faber Merlin to Hotel Merlin for a period of three years for the purpose that Hotel Merlin would operate the hotel as a first-class international standard five-star deluxe hotel. Hotel Merlin would have absolute control and discretion in the operation of the hotel. Under art 3 of the agreement, Hotel Merlin would pay to Faber Merlin a monthly rent of $240,000 throughout the three-year period except that for the first three months commencing 1 March 1988 no rent would be payable and for the period commencing from 1 June 1988 to 28 February 1989 the monthly rent would be $320,000. Article 4 provided that Hotel Merlin would duly and punctually pay to Faber Merlin the monthly rents. Article 8(e) provided that in the event of default by Hotel Merlin, Faber Merlin would terminate the agreement and take possession of the hotel.

On 27 January 1989, Faber Merlin's solicitors issued a notice of demand to Hotel Merlin demanding arrears of rents due and owing under the tenancy agreement in the sum of $1,773,562.22. On 7 March 1989, Faber Merlin's solicitors issued a second notice to Hotel Merlin demanding arrears of rent due and owing amounting to $1,940,542.85 less the sum of $436,652.56 being municipal taxes, assessments and rates. Hotel Merlin refused to pay the sums demanded by Faber Merlin and on 20 April 1989 Reman Estates and Hotel Merlin filed a writ of summons and statement of claim against Faber Merlin. Faber Merlin entered appearance and filed its statement of defence and counterclaim on 24 May 1989. The plaintiffs filed their reply and defence to the counterclaim on 1

June 1989. On 15 June 1989 Faber Merlin took possession of Hotel Merlin. In the affidavit of Johari bin Ahmad affirmed on 15 June 1989 in support of the plaintiffs' application, it was alleged that Faber Merlin by its agent or servant, Mr Gan Tong Kua, the group financial controller, and one Raja Mohar, the manager (Human Resources) together with about 50 persons forcibly took possession of the hotel at about 4.30am on 15 June.

Mr Dennis Xavier, counsel for the plaintiffs, in his submission told the court that it was the plaintiffs' contention and the basis of the plaintiffs' claim that the intention of the parties was that the plaintiffs, after the transfer of assets and liabilities was only to retain a net liability of $3.73m. The consideration of $2 was not a real consideration for the transfer of shares. According to him, the real consideration was the assumption of liabilities by Hotel Merlin for $3.73m after the assets were transferred. Mr Xavier appeared to have arrived at the figure of $3.73m on the basis of a newspaper report in the Star dated 7 April 1988 which was exhibited to the affidavit of Johari bin Ahmad. The newspaper report states, inter alia:

> The sale of Hotel Merlin Kuala Lumpur Sdn Bhd will not be subject to any approval as it is not substantial and does not fall within the ambit of s 132(C) of the Companies (Amendment) Act 1965 nor the guidelines of the KL Stock Exchange.
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> This was stated by Faber Merlin Malaysia Bhd, former owner of the hotel, in a statement in reply to queries from the KLSE over the sale.
>
> *It added that the consideration of $2 was arrived at after taking into account the net liability of $3.73m which Kuala Reman Estates Bhd has to absorb* ... (Emphasis added).

In para 4 of the statement of claim the plaintiffs averred that 'the intention and effect of all the agreements was that the defendant divests itself of the second plaintiff with the second plaintiff retaining a liability of Malaysian Ringgit 3.73m.' Faber Merlin in its statement of defence and counterclaim, denied para 4 of the statement of claim. This is clearly a serious question to be tried.

It will be noted that the first, second and third schedules to the agreement for the sale of assets and assumption of liabilities were left blank when the agreement came into force on 1 March 1988. In a letter written by Faber Merlin dated 17 September 1988 and addressed to Hotel Merlin, Faber Merlin wrote, 'In accordance with agreement for the sale of assets and assumption of liabilities, we furnish herewith schs 1 to 3 for your reference.' In sch 1 the total assets was $13,131,162.11. In sch 2, the amount outstanding to the five creditors as at 29 February 1988 was $9,411,715.15. In sch 3 the amount of loans advanced to Hotel Merlin as at 29 February 1988 was $3,897,899.69. According to para 7(ii) and (iii) of the statement of claim, the parties to the agreement agreed that since it was not feasible to obtain the latest figures for the obligation and liabilities and for the inter-company loans advanced to Hotel Merlin by 1 March 1988, Faber Merlin would supply the figures in schs 2 and 3 within one month from the date of the agreement. Clause 5(g) and (h) of the agreement provided:

> (g) Notwithstanding anything contained herein the parties hereto agree that the buyer shall only assume the obligations and liabilities owing to the creditors named in sch 2 hereto as at 29 February 1988. The parties further agree that as it is not feasible to obtain the latest figures for the obligation and liabilities as at the date hereof when the parties execute this agreement, the buyer *shall supply the figures in sch 2 within one (1) month from the date hereof and* the figures so supplied *shall be conclusive and binding upon the parties hereto.*
>
> (h) Notwithstanding anything contained herein the parties hereto agree that it is not feasible to obtain the latest figures for the inter-company loans advanced to the seller as at the date hereof when the parties execute this agreement, the buyer *shall supply the figures in schedule 3 within one (1) month* from the date hereof and the figures so supplied *shall be conclusive and binding upon the parties,* hereto. (Emphasis added).

The figures were in fact supplied by Faber Merlin six and a half months after the signing of the agreement. Faber Merlin, in its statement of defence, admitted para 7 of the statement of claim. The question that arises is whether the schedules given six and a half months after the date of the agreement were binding on Hotel Merlin. This is another serious question to be tried.

The plaintiffs alleged that the unsecured liabilities of Hotel Merlin as on 29 February 1988 was in the region of $12,281,658.90 and not $3.73m. The plaintiff further alleged, that in addition, there were secured debts amounting to $13,312,614.84 and $16m. Mr Xavier submitted that the plaintiffs agreed to assume liability in the sum of $3.73m and nothing more. It was on that basis that Hotel Merlin was to pay rent of $240,000 a month for three years. In para 8 of the statement of claim, the plaintiffs further alleged that Faber Merlin, in breach of the agreements dated 1 March 1988, failed to disclose to Reman Estates:

(i) that the shoe allowances, annual increments, overtime payments, bonuses and employees provident fund contributions for the years 1986 and 1987 for employees employed by Hotel Merlin amounting to $732,665.24 had not been paid;

(ii) that service charge collected by Hotel Merlin in the month of February 1988 and amounting to $94,972.31 had not been paid to the employees employed by Hotel Merlin;

(iii) that the provision for retirement benefits as of 29 February 1988 for employees employed by Hotel Merlin stood at $2,463,718.66;

(iv) that a sum of $235,966.36 deducted from the February 1988 wages of the employees employed by Hotel

Merlin were not remitted to the various bodies on whose behalf such deductions were made;

(v) that a company Simetech (M) Sdn Bhd had by a court order dated 12 December 1987 obtained judgment when Hotel Merlin was to pay the said company $135,480.80; and

(vi) that as at 1 March 1988, Faber Merlin owed the relevant authorities $989,435.10 and a penalty of $29,205.20 in municipal tax, assessments and licence fees and all other rates, taxes imposition duties penalties and other outgoings levied charged or assessed on or in respect of Hotel Merlin prior to 1 March 1988.

The plaintiffs further alleged that Faber Merlin failed to supply the complete figures in schs 2 and 3 of the assets and liabilities agreement. Faber Merlin in its statement of defence denied all the allegations made in para 8 of the statement of claim. These allegations, which were disputed by Faber Merlin raised serious questions to be tried.

In para 9 of the statement of claim the plaintiffs averred that Faber Merlin had intentionally and unreasonably chosen not to carry out its obligations as contained in the agreements as a result of which the plaintiffs had expended on behalf of Hotel Merlin the following sums:

1	Of improvements made to hotel	257,366.50
2	Part payments towards employees' shoe allowance, annual increment, overtime payment, bonus and Employees Provident Fund contributions for 1986 and 1987	155,504.91
3	Payment of service charge	94,972.31
4	Payment of service tax	48,624.71
5	Payment towards settlement of accounts accrued to defendant	559,582.49
6	Payment towards unsecured creditors.	277,572.47

The plaintiffs further averred that Faber Merlin as at 31 January 1989 was indebted to Hotel Merlin in the sum of $413,195.19 being utility charges for goods supplied and services rendered between 9 March 1988 and 31 January 1989. In para 12 of the statement of claim the plaintiffs averred that Hotel Merlin, after having paid $867,000 refused to make further payment under the tenancy agreement and exercised the right to set-off against all moneys owing by Faber Merlin and against all moneys paid and to be paid on behalf of Faber Merlin.

Mr Xavier submitted that the plaintiffs were entitled to a set-off. In support of his submission he cited *British Anzani (Felixstowe) Ltd* v *International Marine Management (UK) Ltd.*[1] In that case the parties signed two agreements for the lease of two warehouses to the defendants for 21 years. The plaintiffs commenced an action against the defendants. The defendants alleged that serious defects had appeared in the floors of both warehouses making them unusable and claimed damages for more than £1m from the plaintiffs. They also refused to pay any further rent. The plaintiffs subsequently issued a writ claiming possession and unpaid rent and mesne profits amounting to over £570,000. The defendants admitted owing some £540,000 but claimed that the amount owing was subject to a set-off in respect of their counterclaim. The court held that since the defendants' counterclaim arose out of alleged breaches of the agreement which had rendered the warehouses unfit in part for the purpose for which they were leased, and because it would be manifestly unjust to allow the plaintiffs to recover rent without taking into account damages caused by the plaintiffs' failure to perform their part of the agreement the defendants had established a sufficiently close connection between the transactions for them to raise their claim as a set-off against the plaintiffs' claim.

In *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd*,[2] the Federal Court defined a set-off as follows:

> A set-off is a cross claim for a sum of money by a defendant against a plaintiff's claim for another sum of money for which the defendant is being sued. A cross claim is not necessarily a set-off, merely because the word used in the pleading is 'set-off'. Whether or not the plea is a set-off has to be determined as a matter of law and substance. *Hanak* v *Green*. A cross claim which is accepted as a defence of set-off has the effect of extinguishing either the whole or part of the plaintiff's claim. See *In re A Bankruptcy Notice*. But to constitute a set-off the sum of money meant as a cross-claim must from its nature and quality be such that it is proper to be dealt with as a defence to the plaintiff's claim and not as a separate cause of matter.

The Federal Court went on to state at p 161 of its judgment the characteristics of set-off:

> The characteristics of set-off as contained in O 18 r 17 are that (1) it is a cross-claim for a sum of money, ascertained or otherwise; (2) it is relied as a defence to meet the whole or part of the plaintiff's claim; and (3) that it is immaterial whether it is added or not as a counterclaim as long as it is included in the defence. Thus, if a cross-claim relied on by the defendant as a set-off does not and cannot absolve the plaintiff's claim because it arises from a separate transaction, we agree that the cross-claim is not necessarily a set-off, though it is so described, and that such cross-claim could, because of its nature and quality, only amount to a counterclaim. (See Lord Denning MR in *Federal Commerce & Navigation Co Ltd* v *Molena Alpha Inc*).

From the passage just quoted it appears that a plea of set-off is relied upon as a defence to meet the whole or part of the plaintiffs' claim. In the *British Anzani* case[1] and *Permodalan Plantations* case[2] it was the defendant who pleaded a defence of set-off. In the present case it is the plaintiffs who pleaded a set-off in the statement of claim. However from the evidence the plaintiffs' claim is so closely connected with Faber Merlin's claim for arrears of

rent under the tenancy agreement. In my view, whether or not the plaintiffs are entitled to a set-off, is a serious question to be tried.

Faber Merlin in its defence and counterclaim claimed for arrears of rents and asked the court to order delivery of vacant possession of the hotel to Faber Merlin. The question that arises here is whether or not Faber Merlin can rely solely on the tenancy agreement and take advantage of it even though the three agreements were so interrelated to one another. This is again a serious question to be tried. Encil Ismail, counsel for Faber Merlin contended that the plaintiffs' application for an interlocutory injunction should not be granted. He referred to para 15(a) of the statement of claim, where it was stated that 'the plaintiffs' claim for ... (c) specific performance of the agreements as declared'. In support of his contention he referred to s 54(f) of the Specific Relief Act 1950 which states that 'an injunction cannot be granted ... (f) to prevent the breach of contract the performance of which would not be specifically enforced'. Mr Xavier, however, argued that the plaintiffs' claim was based on the sale and purchase agreement for sale of shares and the other two agreements. He said that these agreements were specifically enforceable. He submitted that whether the agreement was specifically enforceable or not was a serious question to be tried and relied on *Si Rusa Beach Resort Sdn Bhd* v *Asia Pacific Hotels Management Pte Ltd.*[3] In my view s 54(f) of the Specific Relief Act should be read together with s 20. I agree with Mr Xavier that whether the agreements are specificially enforceable or not is a serious question to be tried. In the *Si Rusa* case,[3] counsel for the appellant urged upon the court to consider two points of law: (a) by virtue of s 20(1)(g) of the Specific Relief Act 1950 the contract could not be specifically performed and (b) in view of s 54(f) the contract could not be specifically enforced. Abdul Hamid CJ (Malaya) (as he then was) in delivering the judgment of the Federal Court said:

> While we appreciate that these questions are crucial indeed they are the main grounds upon which the appellant's case rest, we do not, however, see the necessity at that stage for the learned judge to decide on these difficult points of law. Suffice for the learned judge to decide, and this he did, that there are serious questions that have arisen for trial ...

Since there are serious questions to be tried in the present case, the next question to consider is whether damages would provide an adequate remedy for the plaintiffs in the event of their succeeding at the trial. See *American Cyanamid* v *Ethicon*[4] at pp 406 and 408. In my opinion Hotel Merlin would suffer irreparable damage which could not be compensated if the injunction prayed for was not granted. Mr Xavier submitted: 'The employees are ours, licences are in our name, ie in the name of Hotel Merlin. We are the only one to have the licence to run the hotel. We will lose a lot of business, reputation in the hotel industry, goodwill and will be contractually liable to third party.' Paragraph 7 of Johari's affidavit in support of the plaintiffs' application also states:

> By reason of the unlawful manner in which the defendant took possession and removed the second plaintiff, the second plaintiff has suffered damage and continues to suffer irreparable damage not only to its business and goodwill but also place the second plaintiff in jeopardy of being rendered liable for breach of contract by third parties. This is more so the case as the second plaintiff's main revenue is in the form of group bookings. This is more aggravating at this point in time with SEA Games to be held in August.

Faber Merlin recognized that Hotel Merlin had gained reputation as a first class five-star hotel. In preamble A of the tenancy agreement it was stated that: 'The lessee has substantial expertise and a high reputation in the operation of first class international standard five-star deluxe hotels.' In my view goodwill and reputation cannot be compensated with money. If the injunction is refused Hotel Merlin will suffer irreparable damage. It is not in dispute that Hotel Merlin had the expertise to operate a first class five-star hotel. On the other hand there is no evidence that Faber Merlin has the expertise to operate a first class hotel like Hotel Merlin. It is clear therfore that the balance of convenience lies in favour of granting the injunction.

I shall now deal with Faber Merlin's application. As already stated this application is for a mandatory injunction. Although the second part of prayer 1 is couched in prohibitory terms restraining the plaintiffs from entering or remaining on the hotel premises, prayer 1 must be read as a whole and the second part is in effect asking for a mandatory injunction. See *Sivaperuman* v *Heah Seok Yeong Realty Sdn Bhd*[5].

The application was supported by the affidavit of Raja Mohar bin Raja Zainal Abidin, manager of human resources and administration of Faber Merlin, affirmed on 19 June 1989. In para 3 of the affidavit the deponent averred that the matter arose from the retaking of possession of Hotel Merlin by Faber Merlin who was the owner of the hotel. According to him, since the taking over of the possession of the hotel by Faber Merlin, the situation had become tense, serious and potentially explosive and it was necessary for Faber Merlin to make the application. In para 5 the deponent averred that if an order as applied for in the application was not obtained the situation could well get out of hand resulting in damage to property and injury to people. In para 6 the deponent averred that Faber Merlin gave the undertaking as to damages.

Raja Mohar's affidavit referred to the affidavit of Anwar Batcha affirmed on behalf of Faber Merlin on 19 June 1989. This affidavit sets out the sequence of events leading to the taking of possession of the hotel. In para 6 of the affidavit, the deponent averred that Faber Merlin

was entitled to take over possession of the hotel under the provisions of the tenancy agreement, which had been terminated by Faber Merlin as a result of the breach of the said agreement by Hotel Merlin. He added that the taking of possession of the hotel was in accordance with the law and Faber Merlin, in taking possession of the hotel, did not in any manner exceed the bounds prescribed by law. Faber Merlin denied that Hotel Merlin had suffered any loss or damage. According to the deponent Hotel Merlin not being entitled to possession of the hotel could suffer no loss or damage recognizable in law. In para 10 he averred that the plaintiffs unlawfully retook possession of the hotel.

It appears that the sole basis of Faber Merlin's application was that Hotel Merlin did not pay the arrears of rents due and owing to Faber Merlin. Faber Merlin then invoked art 8(e) of the tenancy agreement and terminated the lease after giving due notice to Hotel Merlin. Article 8(e) allowed Faber Merlin to take possession of the hotel after the lease was properly terminated. Encik Ismail submitted that in considering the application the court should examine only the tenancy agreement. He added that whatever breaches in respect of the other two agreements were not relevant to his application. In support of his submission he cited *Nouvau Mont Dor (M) Sdn Bhd* v *Faber Development Sdn Bhd*[6]. In that case the Federal Court decided that whether or not an assignment was an absolute one (not purporting to be by wasy of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 was to be gathered only from the four corners of the instrument itself. In that case the only question to be decided by the Federal Court involved the interpretation of an assignment made on 18 February 1978 between the appelant as assignor and the Public Bank as assignee.

In my opinion the present case is different from the *Nouvau Mont Dor* case[6]. In the present case the three agreements were interrelated. Clause 4(b) of the sale and purchase agreement expressly provided:

> The purchaser further covenants and undertakes to cause the company to execute simultaneously with this agreement (i) a tenancy agreement whereby the vendor shall let and the company shall take the hotel building and equipment more fully described in the tenancy agreement and (ii) the agreement for the sale of assets and assumptions of liabilities.

The tenancy agreement would not be in existence if the sale and purchase agreement was not concluded between the parties concerned. Since all the three agreements were interrelated the court, in considering the tenancy agreement has to take into consideration the plaintiffs' allegations that Faber Merlin had failed to comply with the terms of the other two agreements. Encik Ismail argued that since the lease was terminated, Hotel Merlin was a trespasser on the premises. According to him the basis of a mandatory injunction flowed from the fact of the first plaintiff being a trespasser.

Our courts have already dealt with the question of mandatory injunction. In the *Sivaperuman* case,[5] the Federal Court held that a mandatory injunction would never be granted save in exceptional and extremely rare cases. In *Bank Islam Malaysia Bhd* v *Tinta Press Sdn Bhd and Ors*,[7] I stated at p 259:

> From the evidence stated above, I find that the bank has an unusually strong and clear case against the first defendant. I am confident that at the trial of the suit, the court will probably grant a mandatory injunction against the first defendant. If the injunction had not been granted earlier, the bank would probably suffer grave damage and greater hardship. The value of the equipment would reduce considerably and the bank would not be able to recover half of the money spent to purchase the equipment. I find that the balance of convenience is very much in favour of the bank.

The decision in the *Bank Islam* case[7] was upheld by the Supreme Court in *Tinta Press Sdn Bhd* v *Bank Islam Malaysia Bhd*.[8]

In my view Faber Merlin had failed to show that this was an exceptional and extremely rare case for the court to grant a mandatory injunction. It is true that Faber Merlin was entitled to take possession of the hotel under the tenancy agreement. But the court has to consider Faber Merlin's obligations under the two other agreements as well. There were allegations that Faber Merlin had acted in breach of the other two agreements. As already stated, there is no evidence that Faber Merlin has the expertise to run a five-star hotel. On the other hand Hotel Merlin has acquired the reputation and goodwill to operate the hotel as a five-star hotel of international standard. In the circumstances this was not an exceptional and extremely rare case for the court to grant a mandatory injunction. Furthermore the balance of convenience was not in favour of granting the injunction. For the reasons stated above, I granted the order dated 20 June 1989.

Plaintiffs' application allowed.

Solicitors: *Dennis Xavier & Chandra; Mohd Ismail & Co.*

Reported by *PS Ranjan*